Jones Transfer Company *and* Stephen Baynai. Case 7–CA–29316

June 24, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On March 28, 1991, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent, Jones Transfer Company, Romulus, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Michael Blum, Esq., for the General Counsel.
Thomas Paxton, Esq., of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on May 30, 1989, by Stephen Baynai, an individual, against Jones Transfer Company (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint dated July 5, 1989, alleging violations by the Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). The Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Detroit, Michigan, on November 1, 1989, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Michigan corporation, has an office and place of business in Romulus, Michigan, where it is engaged in the intrastate and interstate motor freight transportation of automobile parts and related products. During the year ending December 31, 1988, the Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 by its interstate transportation of parts and products. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Local 299 is the collective-bargaining representative of the Respondent's drivers, dock, and office employees. Stephen Baynai, who until February 24, 1989, had been employed as a truckdriver by the Respondent and its predecessor for a period of 15 years, was a member in good standing in the Union. Baynai was also a member of Teamsters for a Democratic Union (TDU), a ''dissident group'' within the Teamsters.

The Respondent summarily discharged Baynai on February 24, 1989. In the instant case, the General Counsel contends that the discharge occurred as a result of Baynai's union activities, and because Baynai, in concert with other employees, had engaged in protest against certain actions by the Respondent affecting the wages, hours, and working conditions of the unit employees. The Respondent asserts that it discharged Baynai solely because, on February 4, he violated the Respondent's established work rules.

B. *Facts*[1]

The Respondent utilized Baynai as a city driver, only. It is undisputed that the employee had an excellent work record and, for the 5-year period preceding his discharge, he did not engage in any work rule infraction resulting in disciplinary action or warning. Indeed, the Respondent's assigned reason for the discharge relates solely to matters which occurred on February 24, 1989.

In March 1986, Baynai ran for the position of union steward, mounting an unsuccessful challenge to the incumbent steward of more than 20 years, Larry Prieur. Baynai's principal campaign issue was safety. As elections for steward are held no more often than every 3 years, and must be requested, Baynai, early in 1989, discussed with the Union's business agent and others, the possibility that he, Baynai, would request that an election be held in March 1989.

[1] The factfindings contained here are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth infra.

In the years preceding his discharge, Baynai wore TDU buttons to work and posted TDU literature on company bulletin boards. In May 1988, he and employee David Shinn had a conversation with Terminal Manager Leonard Antolczyk.[2] According to the credited and uncontradicted testimony of Baynai and Shinn, Antolczyk asked Baynai if he had gotten some of his ideas about safety from TDU. Baynai said no, but acknowledged that he was a member of TDU.

In July 1988, the Respondent proposed a ''Change of Operations'' to transfer the servicing of a customer account to another facility. Baynai discussed the matter with fellow employees and found that they were upset about it. He and employee Shinn then drafted a petition, protesting the change, and circulated it among the dock workers and the drivers. Baynai also voiced his opposition to the proposed change at a union meeting held that month. Following the meeting, he filed seven contractual grievances over the operational change, and multiple grievances were also filed by employees Shinn and Bolton.

The grievances were consolidated and were heard at the local level in August 1988. At that time, according to the credited and uncontradicted testimony of Baynai and Shinn, Respondent's president, Gary White, in the presence of Antolczyk and Assistant Terminal Manager and Statutory Superisor Frank Zavistoki, told Baynai, Shinn, and Bolton that the Respondent would not change anything and he accused the employees of trying to hurt the Company. Baynai stated that he was looking out for the interests of future, as well as present, Jones employees. White became visibly angry and he told Baynai that the employee was living in a dream world and that he should be concerned about the present, only. Ultimately, the grievances were denied and the change was implemented.

Late in 1988, the Respondent introduced a profit-sharing plan and it sent out literature concerning same to each employee. The plan included a 15-percent reduction in wage rates. In November, Antolczyk asked Baynai to come into the office to discuss the matter. Antolczyk, according to the credited and uncontradicted testimony of Baynai, attempted to explain the Company's need for the wage concession. When Baynai asked for proof that the Company was in a difficult financial position, Antolczyk produced financial records showing that Jones was not a profitable operation. Baynai asked for the records for Customer First and City Transfer Companies, and expressed the belief that the Respondent was deliberately showing losses at Jones while increasing its profits at the other companies it owned. Antolczyk became angry and Baynai stated that when he, Baynai, became steward, he would demand additional financial information. Antolczyk told Baynai that he was an extremist and that he had a bad attitude towards the Company. Baynai stated that he could not seriously consider a proposal which reduced wages by 15 percent and did not grant any guaranteed benefits to the employees.

A meeting at the union hall, concerning the plan, occurred late in November, and was attended by Respondent's vice president, Dean Duffy. According to the credited and uncontradicted testimony of Baynai and Shinn, Duffy explained the plan and a number of employees, including Baynai, asked questions and made comments. Baynai questioned Duffy about a discrepancy between profit figures reported by the American Trucking Association and those reported by the Respondent. Duffy became angry and stated that the Respondent would close its doors if the employees did not accept the plan. Baynai said that guarantees should be given to the employees that the money saved by the Company, under the new plan, would be spent for new equipment and safety features. Duffy replied, stating that the employees would not have a voice in deciding how the money was spent. Th next day, Antolczyk told Shinn that he, Antolczyk, had heard that Shinn and, particularly, Baynai, had been vocal and boisterous at the meeting.

Starting in November 1988, and until the time of his February 24, 1989 discharge, Baynai worked as a local or city driver assigned to a ''Just In Time'' (JIT), run. Such JIT assignments were made pursuant to contractual arrangement between the Respondent and Ford Motor Company under which the Respondent obligated itself, daily, to pick up automotive parts at the places of business of the various Ford suppliers, at specified times of the day, and to deliver same to a Ford assembly plant at a designated time. Individual JIT drivers, each day, delivered the parts they received from the suppliers to the Respondent's terminal. A line haul driver then made delivery of parts to Ford.

Each JIT driver received from the Respondent a sheet of paper listing the Ford suppliers to be visited by the driver every day and the one-half hour ''window time'' pertaining to each supplier, that is, the designated time for the pickup of parts from that supplier. Baynai testified that, when first assigned to a JIT run, he was given such a listing by Dispatcher Odi Cole, a statutory supervisor, and was told by Cole to check with the driver formerly assigned to the run, Tom Giampapa, for specific instructions. Giampapa told Baynai to maintain the pickup schedule by being at each customer location ''sometime within'' the designated window period.

JIT drivers are required to complete and submit, on a daily basis, a ''Form 44,'' showing, inter alia, the number of pieces picked up at each supplier location, the weight of such pieces, the bill of lading number, and the driver's times of arrival and departure. Baynai testified that, when he was first assigned to the JIT run, he wrote down the ''window period'' arrival and departure times on a blank form 44 and gave this form to the dispatcher to be photocopied, and, then, used on subsequent days. Thus, each day, while accurate information was entered on the form 44 with respect to other items, arrival and departure times at the supplier locations entered on the form 44 were the window times, and not the actual times. Drivers David Shinn, Robert Kemmitz, and Al Lauhoff testified that they, on a daily basis, followed the same practice. Indeed, Shinn's credited and uncontradicted testimony was that he was instructed to follow this procedure by Assistant Terminal Manager Frank Zavistoki who told Shinn that that was what Ford Motor Company wanted to see.

While half-hour lunch periods are built into the scheduled JIT runs coffeebreaks are not. Drivers are expected to fit in their coffeebreaks as they can.

The Respondent's work rules prohibit drivers from taking coffeebreaks prior to making their first scheduled stops.

[2] The parties agree that, at all times material, Antolczyk served as the Respondents terminal manager and was a statutory supervisor.

Also, drivers may not go off route to take a coffeebreak. However, Baynai Shinn, Kemmitz, and Lauhoff all testified that those rules do not apply to JIT drivers who, frequently, take coffeebreaks before completing their first stops. Shinn further testified that he took a coffeebreak, before making his first stop, on a daily basis, and he so advised Supervisor Cole. On occasions, he was observed while taking such breaks by Zavistoki. Neither Cole nor Zavistoki indicated that there was any concern about the matter. The drivers further testified that coffeebreaks were not noted on the form 44s, that the times for scheduled lunchbreaks were not strictly adhered to, that JIT drivers determined their own routes, and that they did not remain at supplier locations for their entire window periods. Indeed, according to the drivers, most of the suppliers would not allow a driver to remain there for the entire time period. Prior to February 24, 1989, the Respondent neither disciplined nor discharged JIT drivers for infractions in these regards.

On February 24, Baynai testified he arrived at the terminal at his starting time, 8 a.m. After hooking up his tractor and trailer, he left, at 8:19 a.m., and proceeded to a coffeeshop located some 3 miles from the terminal. Baynai stayed at the coffeeshop for approximately 20 minutes, and had coffee with fellow JIT drivers Lanny Chalmers and Clark Cody. Baynai then proceeded to his first scheduled stop, Mexican Industries, arriving at approximately 9:10 or 9:15 a.m. Baynai testified that he had, theretofore, followed this same procedure, as Mexican Industries, whose window period is 9 to 9:30 a.m., had advised him that, daily, there would be no one to receive him before 9:10 a.m. Baynai left the Mexican Industries locale at 9:30 a.m., his scheduled departure time, and proceeded to his other morning stops, making on-time arrivals.

Baynai was scheduled for lunch between 12:05 and 12:35 p.m. He testified that he arrived at a restaurant for lunch, at about noon and stayed until about 12:35 p.m., a 30- to 35-minute period. He had lunch with fellow driver Ron Prieur, who was at the restaurant when Baynai arrived and remained there after he left. Baynai then proceeded to make his afternoon stops and returned to the Jones terminal at 6:10 p.m., the scheduled time. He testified that he was not late for any of his pickups . On arrival back at the terminal, he was informed by Assistant Terminal Manager Zavistoki that he, Baynai, had been followed that day and that he was being discharged for ''stealing time.'' At a hearing held on Monday, February 27, concerning a grievance filed by Baynai in protest of the discharge, he was advised that an additional reason for the discharge was that, in leaving the coffeeshop on the morning of February 24, he ''backtracked'' for approximately 1 mile enroute to Mexican Industries. In this connection, Baynai testified that JIT drivers are themselves required to determine the safest and fastest routes, and that he had done so in this case. Thus, he testified, the alternative route was less safe, no faster in time, and only one-half mile shorter in distance.

As noted, on the morning of February 24, Baynai was joined at his coffee stop by fellow JIT drivers Lanny Chalmers and Clark Cody, who were also breaking for coffee prior to making their first stops. Chalmers and Cody also received discharge notices on February 24, and they, too, filed grievances protesting those actions. At grievance hearings held on February 27, the Respondent agreed to reduce Chalmers' discharge to a 1-day suspension, and to reduce Cody's discharge to a 3-day suspension. However, the Respondent refused to reinstate Baynai with imposition of discipline short of discharge. At trial, the Respondent offered no evidence tending to explain the disparate treatment of the three individuals.

Employee Kemmitz testified that, about 1 month after Baynai's discharge, he, Kemmitz, met with the terminal manager, Antolczyk. Kemmitz stated that he thought that Baynai had gotten a ''pretty rotten deal.'' Antolczyk replied, stating, ''well Steve got on JIT and thought we couldn't get him . . . we got him.'' Kemmitz' testimony in this regard was uncontradicted and is credited.

Terminal Manager Antolczyk testified that he, alone, made the decision to discharge Baynai, that he did not consult anyone, and that his decision was based, solely, on his observations of Baynai's activities on February 24. Specifically, Antolczyk testified, Baynai was discharged for ''stealing time'' by being off route, taking an unauthorized coffeebreak, and taking an extended lunch period.

According to Antolczyk, the Respondent, at that time, had been placing, randomly, its drivers under surveillance and, on February 24, he decided to follow a particular trailer from the terminal and, when he proceeded to so, he did not know that the trailer was being driven by Baynai. Thus, Antolczyk testified, the drivers, while utilizing the same tractors each day, take different trailers. However, Baynai testified that, from the time he was first assigned to a JIT run, he drove the same trailer each day and that it was quite distinctive in appearance.

As to his observations of February 24, Antolczyk testified that he followed Baynai out of the terminal between 8:15 and 8:20 a.m., and to the coffeeshop, where he arrived at 8:25 a.m. Antolczyk offered no further testimony concerning what he saw that day, relying, instead, on a document typed under his supervision on February 27, and reflecting his notes made on February 24, while following Baynai. The original notes were not produced at trial. The document prepared on February 27, and received in evidence, states that Baynai remained at the morning coffee stop for some 35 minutes, and that he did not leave until 9 a.m., and did not arrive at Mexican Industries until 9:25 a.m. Further, according to this document, Baynai failed to arrive and depart, at other morning stops, in compliance with the window periods, that is, he was not at those stops for the full window periods. He arrived for his lunchbreak, the document reflects, at 11:50 a.m., and did not depart until 12:40 p.m.

Antolczyk and Assistant Terminal Manager Zavistoki testified that it was necessary for JIT drivers to be at the suppliers' locations for the entire window periods. Thus, they explained the JIT program was set up by Ford to get items from the supplier to the assembly line in a specific time period. Under the program, the supplier is entitled to a 30-minute period in which to ship freight. If Jones is not available to receive freight during the window period, causing the nonshipment of a piece of freight, it must pay premium costs to assure the timely shipment of such freight. Zavistoki conceded, however, that the suppliers themselves could shorten the window periods since, in that case, the potential liability was their own.

According to Antolczyk and Zavistoki, on JIT runs, without scheduled coffeebreaks, the drivers were to take their coffeebreaks at the customer locations. They were also permitted to stop for coffee, so long as they remained on their routes. Zavistoki further testified that JIT drivers were instructed, either by Zavistoki, himself, or by Dispatcher Cole, that they had to be at the supplier locations for the full half-hour window period, unless released early by the supplier.

C. *Conclusions*

Baynai, Shinn, Kemmitz, and Lauhoff impressed me as honest and forthright witnesses, in possession of clear and certain recollections of the matters and events about which they testified. I have fully credited the testimony of each of them. On the other hand, Antolczyk displayed little independent memory of the critical events of February 24, 1989, relying, instead, on a document prepared several days after that date, from notes not produced at trial. In light of Antolczyk's lack of independent memory, the unreliability of the document, and my unfavorable observations of his demeanor as a witness, I have not credited those portions of his testimony which conflict with the testimony of the credited witnesses.

The credited record evidence in this case shows that Baynai, a 15-year employee with a good work record, became active in union politics, and in a dissident movement within the Union, in the years preceding his discharge. During the months prior to the February 24, 1989 discharge, he, in concert with other employees, engaged in repeated protests against actions of the Respondent affecting employees' wages, hours, and working conditions. The Respondent's highest officials knew of Baynai's activities and expressed their anger and hostility concerning same. After the discharge, Antolczyk, who effectuated that action, told an employee that, while Baynai thought that the Respondent ''couldn't get him,'' Respondent, nonetheless, ''got him.'' The General Counsel has, thus, established a prima facie case of unlawful discharge under the Act, and it is a very strong one.

The Respondent's contention that, even in the absence of Baynai's union activities, and other protected conduct, he would have been discharged because of his on-the-job actions of February 24, does not withstand scrutiny. The assigned reasons for the discharge, an unauthorized coffeebreak, an extended lunch period, and going off route, are premised on sudden application of rules not theretofore applied to JIT drivers, incorrect factual suppositions, and disparate treatment of Baynai and his fellow JIT drivers.

The credible record evidence reveals that prior to February 24, the Respondent did not apply its rule against coffeebreaks before a driver's first stop, to JIT drivers. Those drivers very frequently took such coffeebreaks and the Respondent knew it and voiced no concern about it. Yet, on February 24, the Respondent, without warning, precipitously discharged drivers Baynai, Chalmers, and Cody for their actions in that regard. Not easily explained, and the Respondent has made no effort to do so, is why Respondent immediately converted the discharge actions against Chalmers and Cody to short suspensions, but refused to consider that course of action with respect to Baynai.

The record evidence further shows that Baynai's lunch period on February 24 did not exceed the authorized time and that, in any event, JIT drivers, as a matter of practice, do not adhere strictly to their scheduled lunchbreaks. Moreover, it was known to the Respondent, by virtue of its surveillance of Baynai, that driver Ron Prieur, who had lunch with Baynai on February 24, took a longer lunch period than did Baynai. Yet, the Respondent took no action against Prieur.

As shown in the statement of facts, the Respondent permitted and required its JIT drivers to determine their own routes, based on their judgments with respect to speed and safety. There is no evidence in this case, whatsoever, that the decisions made by Baynai in that regard, on February 24, constituted an abuse of the discretion which the Respondent had granted him as a JIT driver, or that the Respondent entertained a reasonable belief that there had been such an abuse of discretion.

The suddenness of the discharge; the Respondent's failure to inform Baynai of the details of the alleged infraction or permit him to offer explanation; the precipitous application, without warning, of rules not theretofore applied; and the incorrect factual supposition made by the Respondent to support the discharge, all suggest, in the strongest way, that the reasons advanced by the Respondent to support the discharge, are pretextual. This conclusion is further mandated by the evidence showing the disparate treatment of Baynai and other, similarly situated, employees. I find and conclude that Baynai was discharged for reasons proscribed by the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Jones Transfer Company is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Stephen Baynai because of his union and other concerted activities, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Jones Transfer Company, Romulus, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their union activities or other concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Stephen Baynai immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or prlvlleges.

(b) Make Stephen Baynai whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

(c) Expunge from its files any reference to the discharge and notify Baynai, in writing, that this has been done.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Romulus, Michigan facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees because of their union activities or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL offer to Stephen Baynai immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges and WE WILL make him whole for any loss of earnings and other benefits resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the discriminatory discharge and notify the effected employee, in writing, that this has been done.

JONES TRANSFER COMPANY